## THE POWERS OF THE APPROACHING CONSTITUTIONAL CONVENTION IN VIRGINIA.

In compliance with the request of the editor of the REGISTER that I supplement my article on the Powers of Constitutional Conventions in general, by a further paper on the powers of our approaching Constitutional Convention in particular, as regards the enactment of a new Constitution without first submitting it to the People for ratification, I beg to submit the following:

Assuming it to be true that the Convention is not sovereign and cannot *enact* a Constitution unless expressly authorized so to do by the People, the question naturally arises: Where shall we look for that authority? The Legislature has acted only twice in connection with this Convention, viz: *First*, by the Act of March 5, 1900, submitting to the people the question of calling the Convention; and *Second*, by the Act of February 16, 1901, providing for the election of delegates to the Convention, and for the time and place of its sitting, etc.

To which of these two Acts must we look to ascertain the limits of the Convention's powers?

There is much respectable authority to support the view that the Act of February, 1901, is the one which fixes and limits the powers of the Convention; but this, the writer submits, is a palpable and demonstrable error, almost as dangerous in its potentialities as the heresy of Convention Sovereignty.

If we except the first American State Legislatures, which resolved themselves into "Revolutionary Conventions," it has never been contended in this country, by any one, that a Legislature (except in a particular manner, expressly authorized by the Constitutions of some States), has any power to change the Fundamental Law. No one claims this power, except for the People themselves, or for the Convention as their representative. Now, if the Convention be Sovereign, as some insist, so that even the People cannot limit its powers (they being reduced to the alternative of either having no Convention at all, or else having one vested with uncontrollable sovereignty), then, surely, is the *Legislature* powerless to prescribe or limit the powers or functions of this Sovereign body. On the other hand, if it be true, as the writer endeavored to show in his first article above referred to, that

the *People alone* have the power of enacting or changing the Fundamental Law; that from them alone does the Convention derive its powers in that regard; and that they can confer just so much, or so little, of those powers upon the Convention as they please—then it necessarily follows that the *Legislature* (which is not "the People") cannot prescribe the Convention's powers.

It seems absurd to conceive of powers being conferred by one body and the limitations of those Powers being fixed by another body. Surely the right to *confer* power necessarily carries with it the right to *limit* the power conferred, if it may be limited at all; and, *a fortiori*, the right to prescribe the limitations of powers, implies the right to grant them. If we concede to the Legislature the right to prescribe limits for the powers of the Convention, we must also concede to it the right to grant these powers, which no one claims: for how could the Legislature grant powers that it did not possess? If the powers may be limited at all, it must be by the authority from whence the powers sprung. It seems clear, therefore, that if any Body can limit the powers of the Convention, that Body must be the People themselves, from whom alone the powers of the Convention emanated. Now of what use would be this power of the People to limit the authority of its agent, the Convention, if another agent, the Legislature, could, without permission of the People, alter such limitations?

If the Legislature may restrict, it may also enlarge, the powers of the Convention. It is most reasonable to assume that the extent of the powers of a proposed Convention is a controlling element in fixing the decision of the People as to whether or not to call such a Convention into being. Many a man might vote to call a Convention to *propose*, who would not vote for one to *enact*, a new Constitution. But if the Legislature may *afterwards* prescribe or alter the powers of such Convention, a gross fraud could be thus perpetrated upon the People, by first inducing them to call a Convention to *propose*, and, after it has been so called, then authorizing it to *enact*, a Constitution.

This was in effect done in 1829, in this State, against the protests and unanswerable arguments of some of its leading statesmen. On that occasion the real will of the People was doubtless carried out substantially, but the method adopted was a most dangerous precedent, and one which, if recognized, may be repeated to thwart, rather than to carry out, the will of the People—it was but another instance of "hard cases making bad law."

Suppose the question should be submitted by the Legislature to the

People: "Shall a Convention be called for the purpose of proposing a new Constitution to be submitted to the People for ratification or rejection?" Suppose that the People should vote favorably upon the proposition, and such Convention be accordingly ordered; and that the Legislature should *then* enact that such Convention be authorized to adopt a Constitution *without* submitting it to the People: what, in such a case, would be said by the advocates of the right of the *Legislature* to prescribe the powers of a Constitutional Convention?

It seems clear, therefore, that, unless we concede the sovereignty of the Legislature in reference to the Fundamental Law, we must deny to it the right to prescribe the powers of Constitutional Conventions. If this conclusion be sound, it follows that, in ascertaining the powers of the Convention, we cannot look to the Act of February, 1901, passed *after* the Convention had been ordered by the People; and that the limitations upon the Convention, sought to be imposed by that Act, which was never submitted to, nor ratified by, the People, are of no binding force.[1]

This criticism must, of course, be understood as applicable only to such parts of the Act of February, 1901, as undertake to prescribe or limit the powers of the Convention in the matter of changing the Constitution—in the mere matter of prescribing the size of the Convention, the election of its members, the time and place of its assembling, and the details incident to its proceedings, etc., the Legislature doubtless has full authority.

Where, then, it may be asked, must we look for the real limitations of the Convention's powers, if not to the Act of February, 1901? The answer is obvious: To the Act of March 5, 1900, under which the Convention was ordered to be called. But, it will be objected, this is also an Act of the Legislature, and can therefore have no more force than the Act of February, 1901, which, being subsequent, is really controlling. It will be seen, however, that the Act of March, 1900, so far as the *Legislature* was concerned, settled nothing; it was a mere proposition, which acquired binding force only by its acceptance by the *People*, who alone may be said to have enacted it.

The mere majority of the People, however great, have no right to enforce their will upon the minority, save when that will is expressed

[1] This question was elaborately discussed and the same conclusion reached by the great Massachusetts Convention of 1853. See Debates Mass. Con. 1853, Vol. I., pp. 73 *et seq.* To the same effect, see the Opinion of the Justices of N. Y. Sup. Ct., cited and quoted in Debates Mass. Con., Vol. I, p. 138.

in a lawful manner—a proposition now generally conceded.[1] The only way, in this State, by which such will can be expressed in regard to a proposed change in the Constitution, is by voting, in the manner prescribed by law, upon a proposition which has been first submitted to the People by the Legislature; and to this extent, by possessing the sole power of initiative, the Legislature may be said to be able to prescribe amendments to the Constitution, and the powers of Constitutional Conventions; but to no greater extent is it true.

The People, by the very unwieldiness of their numbers, are incapable, as a physical fact, of doing more than merely voting 'yes' or 'no' on a proposition that has been first submitted to them by some one. It manifestly would not do to permit any private individual, or body of persons not authorized by the law, to submit such propositions to the People at their pleasure; and, for obvious reasons, the Legislature has been prescribed by law as the only lawful body authorized to submit questions to the People for their acceptance or rejection;[2] such powers, so far as they relate to Fundamental Law, being in the form of either a specific amendment or a proposition for calling a Convention to adopt or propose a new Constitution. The function of the Legislature, in either case, is the same, viz: that of the presiding officer of a vast assembly composed of the People, who merely puts the question to them for their vote and decision, except only that it may be said, pursuing the comparison, that the Legislature also originates and drafts the motion, as well as puts the question and takes the vote, declaring the result. Just as neither the author of a motion, nor the presiding officer who puts it to the house and declares the result, nor both of them together, are the source from which it receives its force and effect, so the Legislature cannot be regarded as the source or authority for the calling of this Convention, which call the Legislature merely submitted to the People for their acceptance or rejection. And the Legislature can no more be said to have enacted any of the terms or provisions of that call than it may be said to have enacted a Constitutional amendment which it has merely prepared and submitted to the People for their adoption.

It is the People, and the People alone, who enacted the call for this Convention, by adopting the proposition submitted to them by the Legislature in 1900, just as it is the voting assembly which *adopts* a motion, and not the author of the motion, or the presiding officer who

[1] Wells *v.* Bain, 75 Pa. St. Rep. 75.

[2] See account of "Dorr's Rebellion" in Luther *v.* Borden, 7 How. (U. S.) Rep. 44.

took the vote, that may be said to have given force and effect to the motion, as an actual resolution, although it is true that in the one case we have to look to the motion, as stated by the presiding officer in putting the question, to ascertain what the real action of the assembly was, and in the other case we have in like manner to look to the call, as framed and submitted to the People by the Legislature in 1900, in order to ascertain what call the People really made. When the motion is adopted, in the first case it becomes the resolution of the assembly, from which alone it derives its validity, and, when the call for the Convention was adopted by the People, in 1900, it became the act of the *People*, and not of the Legislature, which merely framed and proposed it.

It is only by this call that the *People* have ever spoken as to the Powers of the Convention; and as those powers can be prescribed by the People only, it follows that it is the Act of March 5, 1900 (as the act of the *People*, and not of the Legislature), to which alone we must look for the limitation of those Powers.[1]

That Act specifies the purposes for which the Convention was called, to be "*To revise the Constitution and amend the same*"—thus following the form prescribed in the present Constitution. Exactly what meaning should be given to this language is a question of no little difficulty. On the one hand it may be contended that the language should be construed as merely indicative of the *ultimate purpose* for which the Convention is called, and not as defining its powers—just as we might speak of a commission "to revise and amend the Code" without implying an authority to enact the amendments; and the fact that our present Constitution seems to permit the use of no other language would seem to lend additional weight to this contention. On the other hand, it may be insisted that no loose use of language should be imputed to the draughtsman of so important an instrument; that the verb "amend," *ex vi termini*, imports the idea of *enacting*, and not merely *suggesting*, the amendment; and that the People could not have authorized the Convention, in more express terms, to *enact* the amendments than by giving them the power to "amend" the Constitution. Many and strong arguments, and some authorities, may be adduced in support of each of these two views, which space will not permit to be set out here. It is a most important question, which will doubtless be discussed at length and with thoroughness in the Convention, to which, therefore, it is referred.

[1] Opinion of the Justices, 6 Cush. (Mass.), 572.

In case it should be concluded that the terms of the Act of March 5, 1900, do not permit the *enacting* of a Constitution by the Convention, a question may arise as to whether it should be submitted for adoption to the voters qualified under the old, or under the new, Constitution. If we once concede that the Convention is *obliged* to submit the amendments to the People, it is difficult to see how any real doubt could exist as to who the People are to whom the submission must be made. The authorities (and, we submit, reason likewise) hold that the voters qualified under the old (and therefore existing) Constitution, are the voters to whom alone the submission must be made.[1] If we attempt to apply the suffrage qualification of the new Constitution before it is adopted, will it not manifestly be an adoption of that instrument *pro tanto*, by the Convention, without submitting it to the People? And, if the Convention may, without submitting it, adopt the new Constitution in part, why not *in toto?* Even the Convention of 1829, which went to the extreme length in this respect, admitted the validity of this argument, but sought to justify its action in allowing those, newly qualified by the proposed Constitution, to vote on its adoption, by relying upon the Act of the Legislature under which the delegates to the Convention were elected, and which expressly authorized the new Constitution to be voted upon by those qualified under its terms—thus, in effect, authorizing the Convention to enact, without submitting it, that portion of the new Constitution embodying the franchise clause thereof.

But, however sound or unsound that contention may have been in the Convention of 1829, there can be no ground whatever to support it in the Convention of 1901. As above pointed out, the Act of the Legislature under which the delegates were elected (having been passed subsequent to the call for the Convention, and never having been passed upon by the People) cannot prescribe the powers of the Convention in the matter of adopting a new Constitution, in whole or in part. And, as was forcibly pointed out by Mr. Randolph and others in the Convention of 1829, the mere election of delegates under such an Act, cannot be regarded as a ratification of the Act by the People, because they have no alternative presented to them. But even if we admit such power in the Legislature, it will be seen that, in this case, the Act under which the delegates to the Convention of 1901 were elected, so far from authorizing them to *enact* any part of

[1] Cooley on Const. Lim., p. 30; 1 Story on Const., sec. 581; Debates Va. Const. 1829, p. 866, *et seq.*

the proposed new Constitution, was explicit in requiring th to submit the whole of it to the People for *their* adoption or rejection. It is plain, therefore, that the Convention of 1901 has not even the excuse that the Convention of 1829 had, for submitting the new Constitution only to the voters qualified under its provisions—assuming, of course, that the Act of March 5, 1900, which alone, as above pointed out, must be looked to for the extent and limitation of the Convention's powers, shall be construed as *requiring* the Convention to submit its work to the People at all.

The Convention of 1901 has no power of *enacting* the suffrage clause of the proposed new Constitution, unless it is authorized to enact the entire Constitution; and, if the Act of March, 1900, does not authorize the Convention to enact the new Constitution *in toto*, that instrument, and every clause of it (the suffrage clause as well as the rest), must be submitted, for adoption or rejection, to the voters qualified under the present Constitution, which undoubtedly remains in full force until the new Constitution is legally adopted.

But suppose it should be decided that the Act of 1900 permits the new Constitution to be adopted and enacted by the Convention, without submitting it to the People, still it is the *right* of the Convention to first take the sense of the People upon its work before finally adopting it, and such might be regarded as a wise and prudent use of the vast powers with which the People have entrusted it, and in keeping with the general spirit of our institutions.[1] Such submission, however, not being obligatory, the result of it would not be legally binding upon the Convention,[2] which would receive it as a Chancellor does the verdict of jury upon an issue out of chancery—merely as persuasive. It follows, therefore, in such a case, that the Convention may submit all, or any part, or none, of the new Constitution to the People before its final adoption, just as the Convention may deem best; and, for a like reason, the submission, if made at all, may be to the whole body of the voters, or to such part of them as the Convention may deem best—to those qualified under the old Constitution, or only to those qualified under the new. The result of the submission being, after all, not a command, but only advice to the Convention, that body may seek such advice from whom it deems best.

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[1] Jameson's Const. Con., sec. 453. Oberholtzer's Referendum in America, chap. IV.

[2] Miller *v.* Johnston, 92 Ky. 589. But, *quære*, if this proposition would hold good if the submission were made to the *entire* body of voters under the old Constitution and none others.